No. 84-6807

OCT 4 1985

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILLIE R. LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court, Fifth Judicial District

BRIEF FOR RESPONDENTS

NEIL F. HARTIGAN
Attorney General, State of Illinois

JILL WINE-BANKS
First Assistant Attorney General

MARK L. ROTERT *
Chief, Criminal Appeals Division
Office of the Attorney General
State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235

Counsel for Respondents

* Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the confession of Petitioner's codefendant was so reliable that its use as substantive evidence against Petitioner was fuliy consistent with the Confrontation Clause.

2. Whether Petitioner's claims arising under the Confrontation Clause can survive where she declined an opportunity to cross-examine the witness in question.

3. Whether, in a case where both Petitioner and her codefendant confess to two murders, the use of the codefendant's confession against Petitioner was merely harmless error.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS INVOLVED .	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I.	
A CODEFENDANT'S CONFESSION, MADE AGAINST PENAL INTEREST, ACCEPTING HIS RESPONSIBILITY, AND INTERLOCKING WITH PETITIONER'S OWN CONFESSION IN ALL MATERIAL RESPECTS, IS SUFFICIENTLY RELIABLE FOR USE AS SUBSTANTIVE EVIDENCE WHERE THE CODEFENDANT IS UNAVAILABLE AND WHERE CROSS-EXAMINATION WOULD BE OF LITTLE VALUE. THEREFORE, NO SIXTH AMENDMENT ERROR OCCURRED AT TRIAL	9
II.	
PETITIONER'S SIXTH AMENDMENT RIGHTS WERE NOT TRANSGRESSED BY THE INTRODUCTION OF HER CODEFENDANT'S CONFESSION BECAUSE SHE WAS AFFORDED THE OPPORTUNITY TO CROSS-EXAMINE HER CODEFENDANT BUT DECLINED TO DO SO	25

III.

ERROR, IF ANY, ARISING FROM THE TRIAL COURT'S CONSIDERATION OF PETITIONER'S CODEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE AGAINST PETITIONER WAS HARMLESS BEYOND A REASONABLE DOUBT 28

CONCLUSION 35

TABLE OF AUTHORITIES

Cases PAGE

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) .. 9, 10, 15, 16, 21, 25, 28

California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) 12, 14, 15, 22, 24, 27

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 23

Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) 9, 12, 14, 21, 28

Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) 28, 29

Nelson v. O'Neil, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971) 22, 28

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) 12, 13, 14

Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979) ..... *passim*

People v. Gil, 125 Ill. App. 3d 892, 466 N.E.2d 1205 (1st Dist. 1984) 19

People v. Richardson, 32 Ill.2d 472, 207 N.E.2d 478 (1965), *cert. denied*, 384 U.S. 1021 (1965) ... 19

People v. Tate, 87 Ill.2d 134, 429 N.E.2d 470 (1980) 23, 24

People v. Thornton, 26 Ill.2d 218, 186 N.E.2d 239 (1962) 20

People v. Tyner, 30 Ill.2d 101, 195 N.E.2d 675 (1964) (distinguished) 22

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 11

Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) 16, 28, 29, 32, 33

Tennessee v. Street, ___ U.S. ___, 105 S.Ct. 2078, ___ L.Ed.2d ___ (1985) 34

United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971) 21

United States v. Longee, 603 F.2d 1342 (9th Cir. 1979) (distinguished) 9, 10

United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) 21

United States v. Parker, 622 F.2d 298 (8th Cir. 1980), *cert. denied*, 449 U.S. 851 (1980) 18

United States v. Paternina-Vergara, 749 F.2d 993 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1197 (1984) 18, 19

United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972) .. 27

United States ex rel. Faulisi v. Pinkney, 611 F.2d 176 (7th Cir. 1979) 9

Statutes and Rules

Federal Rules of Evidence, Rule 804(b)(3) 13

Ill. Rev. Stat., ch. 38, § 5-2(c) 19, 30

Ill. Rev. Stat., ch. 38, § 9-1(a)(1) 2, 19, 33

Ill. Rev. Stat., ch. 38, § 9-2 ..... 20, 31

Ill. Rev. Stat., ch. 38, §§ 114-8, 114-11 26

Treatises

Comments: *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Cal. L. Rev. 1189 (1978) 21

Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and A Proposal for A Due Process Evaluation of Limiting Instructions*, 18 Am. Crim. Law Rev. 1 (1980) 9

McCormick, *Evidence*, § 253 (2d ed. 1972) 14

In The

Supreme Court of the United States

October Term, 1985

MILLIE R. LEE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court, Fifth Judicial District

BRIEF FOR RESPONDENTS

OPINIONS AND JUDGMENTS BELOW

The Order of the Illinois Appellate Court, Fifth District, affirming Petitioner's convictions is not reported. A full text of that Order is located in the Joint Appendix to this case, at pages 30-37.

The Order of the Illinois Supreme Court denying Petitioner's request for leave to appeal her conviction to the Illinois Supreme Court is not reported. The Order of the Illinois Supreme Court is reproduced in the Joint Appendix at page 38.

JURISDICTIONAL STATEMENT

Omitted pursuant to this Court's Rule 34.2.

CONSTITUTIONAL PROVISIONS INVOLVED

Omitted pursuant to this Court's Rule 34.2.

STATEMENT OF THE CASE

Petitioner, Millie Renee Lee, and a codefendant, Edwin Thomas, were jointly charged by a St. Clair County (Illinois) grand jury in a two-count indictment for murder. Count one charged the defendants with the murder of Mattie Darden, and count two charged them with the murder of Odessa Harris. (J.A., pp. 2-3) Consistent with Illinois law, *Ill. Rev. Stat.* ch. 38, § 9-1(a)(1), both counts alleged that defendants acted "without lawful justification and with the intent to kill" their victims. (*Id.*)

Evidence adduced at trial revealed that on the date of the murders, February 11, 1982, Petitioner and her two year old son shared an apartment with the Petitioner's aunt, Mattie Darden. (J.A. 5) On that date, Edwin Thomas, Petitioner's boyfriend, was with Petitioner and her son at that apartment when Darden returned home. Darden was accompanied by Odessa Harris (a/k/a Odessa Donohue) (hereinafter Odessa Harris) when they arrived at approximately 9:00 p.m.

Some time after the arrival of these two women, Edwin Thomas left the Darden apartment briefly. Upon his return, he and Petitioner argued in the kitchen about his departure. (J.A. 6, 17) As this discussion increased in volume, Odessa Harris came to the kitchen and asked Petitioner "what the hell was going on", saying Petitioner and Thomas "ought to be ashamed of [them]selves arguing and making all that noise." (J.A. 6) This prompted harsh words between Petitioner and Ms. Harris, after which Ms. Harris returned to the bedroom where Mattie Darden was located.

Petitioner then "called Odessa back into the kitchen", ostensibly to ask whether Mattie Darden had paid the rent. (*Id.*) As Harris stood with her back to Edwin Thomas, he attacked and stabbed her with a large knife, described as being "like a machette (sic)". (J.A. 7) Ms. Harris began calling out to Mattie Darden, who was still in the bedroom. Petitioner immediately "ran or walked" into Darden's bedroom, where she encountered Darden in the process of arising from her bed. Darden ordered Petitioner to "get out of her way" and displayed a knife, which she swung at Petitioner.* Petitioner promptly "ran into the kitchen", armed herself with a twelve-inch butcher knife, and returned to Darden's bedroom. (J.A. 7) She then stabbed her aunt repeatedly.

Edwin Thomas was still struggling with Odessa Harris during these two encounters between Petitioner and Mattie Darden. (J.A. 19-20) By the time Thomas had subdued Ms. Harris, Petitioner had already stabbed and disabled Darden. Then, Thomas entered the bedroom. Petitioner

---

* Weapons were apparently kept in this apartment as a routine matter "because a lot of burglaries and breakins" plagued the apartment complex. (J.A. 6)

told him to get a hammer. When Thomas was unable to find a hammer, Petitioner directed him to get a "cast iron skillet" from the kitchen because Darden "was still breathing." (J.A. 7) He brought the skillet to Petitioner, who used it to strike the prone figure of Mattie Darden about the head with sufficient force to shatter the skillet, but Ms. Darden was still alive so Petitioner told Thomas to get yet another skillet, which he did. Petitioner and Thomas then took turns using this second skillet as a bludgeon against Darden. (J.A. 7-8, 20) Afterwards, Mattie Darden "was barely breathing and Odessa [Harris] was dead." (J.A. 8)

Petitioner and Thomas then began their efforts to remove all evidence of the murders. They stuffed the body of Odessa Harris into a trunk and placed it in a trash heap. Petitioner then purchased charcoal lighter fluid (R. 55-59) which Thomas poured on the body of Ms. Harris. He then set the trunk on fire. (J.A. 9, 22) The following day Petitioner and Thomas discovered that Harris' body had not been completely consumed by this fire, so they placed the remains in a cardboard box and set it in a garbage area "to make it look like trash." (J.A. 10)

The body of Mattie Darden was taken by Petitioner and Thomas on the evening of the murders to a nearby vacant apartment, where it was placed in a closet. (J.A. 9) Three days later, Thomas returned to the apartment and, using the fluid purchased earlier by Petitioner, set fire to Darden's remains. (J.A. 11)

This latter fire was reported to the East St. Louis (Illinois) fire department and led to the discovery of Darden's body. (R. 13-16) Initially, police believed that the body in this vacant apartment was Harris' because Odessa Harris' purse was discovered near the scene. In an effort to get positive identification of these remains, the police went

to Mattie Darden's apartment, acting on the belief that Darden could provide the identification. (R. 99-102) Instead they encountered Petitioner, who told them that Darden was out of town visiting relatives. (R. 103) Because Petitioner said she knew Odessa Harris, she was asked to accompany the officers to view the body found in the vacant apartment.

While Petitioner was present at the police station, the police were informed that the body found in the vacant apartment was not that of Odessa Harris. They further learned that Petitioner had recently purchased lighter fluid in the neighborhood of the fire. (R. 103-108) Having already observed that Petitioner's apartment "was in quite a shambles" as if "someone had recently been painting the walls", (R. 102) the police decided to admonish Petitioner of her fifth amendment privileges.

Petitioner was then asked directly whether the body found in the vacant apartment was that of her aunt, Mattie Darden. She admitted it was. She was then asked whether she knew of Odessa Harris' whereabouts. Petitioner "said Odessa is dead . . . yeah, that's right, we killed them." (R. 109)

Petitioner thereafter made a full confession, reproduced in the Joint Appendix at pages 4-15. After being again advised of her rights, Petitioner told the police "that she just wanted to get it off her chest." (R. 32) Because her statement named Edwin Thomas, he was also brought to the police station.

When Thomas first arrived at the police station he declined to speak to the police. (R. 112) However, Petitioner requested permission to see Thomas, and he asked to see Petitioner. (R. 114) When the two were allowed to meet, Petitioner

> was allowed to hug and kiss Edwin, and she told Edwin they found out about the purse he was supposed to have gotten rid of. They knew about the whole thing, don't you love me Edwin, didn't you in fact say—more or less the same thing, that we wouldn't let one or the other take the rap alone, and he said yeah. (R. 114)

Thomas confessed immediately after this encounter. (*Id.*)

The confessions of both Petitioner and Thomas detail the events of February 11, 1982, and the subsequent efforts to conceal the homicides. As to events prior to that evening, Thomas' confession revealed that he and Petitioner had previously discussed killing Mattie Darden, "but we had not figure (sic) out just what we would do." (J.A. 17) Petitioner's confession, in turn, stated that she and Thomas "had talked about stoping (sic) aunt Mattie from harassing me before. . . . [and Thomas] began talking about doing something to aunt Beety but he never said what." (J.A. 12)

Thomas' confession detailed the fact that he asked Petitioner, on the evening of the murders, whether she wanted "to go through with it." (J.A. 17) He stated that Petitioner hesitated, but said yes. He also revealed that their plan required Petitioner to summon Odessa Harris into the kitchen and ask her about rental payments as a ruse to enable Thomas to attack Harris from behind. (J.A. 18) Petitioner's confession confirmed only that she summoned Harris into the kitchen just before Thomas stabbed Harris. (J.A. 6) It makes no other mention of conversations between Petitioner and Thomas in the moments preceding the Harris murder.

Petitioner and Thomas were appointed separate counsel for trial. Their pre-trial motions for severance were withdrawn on the day of trial, as was their demand for trial

by jury. (R. 3) The joint trial was combined with a hearing on each defendant's motion to suppress their confessions. (*Id.*) After the prosecution rested, each defendant testified in support of those suppression motions. (R. 205-228) Thereafter, the trial court denied both suppression motions and admitted Petitioner's and Thomas' confessions into evidence. (R. 227) Following closing arguments, the trial court found both Thomas and Petitioner guilty of two counts of murder. The court's announcement of its findings is reproduced in full in the Joint Appendix, pages 25-26.

Thomas perfected an appeal to the Illinois Appellate Court, Fifth District, in which he raised only the propriety of his sentence as an issue. *People v. Edwin Thomas*, No. 82-538 (Ill. App. Ct., 5th Dist.) (brief of defendant-appellant). Petitioner perfected her appeal to the same court, alleging 1) that the trial court's announcement of its verdict abridged her sixth amendment rights; 2) that a material witness to her confession was not called to testify at the motion to suppress; and 3) that her sentence was excessive. *People v. Millie R. Lee*, No. 82-539 (Ill. App. Ct., 5th Dist.) (brief for defendant-appellant). The Illinois Appellate Court rejected all three claims in an opinion reproduced at pages 30-37 of the Joint Appendix. Petitioner thereafter petitioned this Court for a writ of *certiorari* to review the Illinois court's rulings on the sixth amendment question. That petition was granted on July 1, 1985.

SUMMARY OF ARGUMENT

The use of her codefendant's confession as substantive evidence against Petitioner did not violate the Confrontation Clause because the codefendant was unavailable, the utility of cross-examination was slight, and the confession was cloaked with sufficient indicia of reliability. The reliability of the codefendant's confession is clear. The confession was a statement against penal interest; it was corroborated by the other physical and testimonial evidence produced at trial; it made no effort to shift or avoid responsibility; and the confession interlocked with Petitioner's own on all salient points, including the admitted conduct and relative culpability of Petitioner and her codefendant. Every act by Petitioner which constituted an element of the crime of murder is described in her codefendant's confession in the same fashion as she described her own conduct. Therefore, no constitutional error occurred when the codefendant's confession was used as evidence against Petitioner.

Moreover, no denial of confrontation rights may be found in this case because the trial transcript reveals that Petitioner declined an opportunity to cross-examine her codefendant at their joint trial for murder.

Finally, any constitutional error perceived in this case is harmless. Petitioner's own confession, as extensively corroborated by the physical and testimonial evidence produced at trial, constitutes proof beyond a reasonable doubt of her guilt for two crimes of murder. Because sufficient proof of guilt is shown apart from the evidence contained within the codefendant's confession, any sixth amendment error arising at their trial cannot be grounds for reversal of Petitioner's convictions.

ARGUMENT

I.

A CODEFENDANT'S CONFESSION, MADE AGAINST PENAL INTEREST, ACCEPTING HIS RESPONSIBILITY, AND INTERLOCKING WITH PETITIONER'S OWN CONFESSION IN ALL MATERIAL RESPECTS, IS SUFFICIENTLY RELIABLE FOR USE AS SUBSTANTIVE EVIDENCE WHERE THE CODEFENDANT IS UNAVAILABLE AND WHERE CROSS-EXAMINATION WOULD BE OF LITTLE VALUE. THEREFORE, NO SIXTH AMENDMENT ERROR OCCURRED AT TRIAL.

Although the instant case involves the use of a codefendant's confession as substantive evidence against Petitioner, its outcome is not directly governed by this Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968) because of procedural and factual distinctions between the two cases.

First, the "primary focus of the Court's opinion in *Bruton* was upon the issue of whether the jury in the circumstances presented could reasonably be expected to have followed the trial judge's instructions . . .". *Dutton v. Evans*, 400 U.S. 74, 86 (1970). Because of *Bruton's* emphasis on the adequacy of jury instructions, it has been widely held to be "simply inapplicable in the case [as here] of a bench trial." *United States ex rel. Faulisi v. Pinkney*, 611 F.2d 176, 178 (7th Cir. 1979); *see also* Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and A Proposal for A Due Process Evaluation of Limiting Instructions*, 18 Am. Crim. Law Rev. 1, 27 (1980).[1]

[1] For this reason, cases cited by the Petitioner, such as *United States v. Longee*, 603 F.2d 1342 (9th Cir. 1979), while no doubt

(Footnote continued on following page)

Second, *Bruton* is factually inapposite because, despite the fact that the confession of Bruton's codefendant Evans implicated him, Bruton "maintained his innocence from the beginning." *Parker v. Randolph*, 442 U.S. 62, 72 (1979). Petitioner, by contrast, "corroborated [her] codefendant's statements by heaping blame onto [her]self." *Id.* at 73.

Third, *Bruton* involved the spillover use against Bruton of a confession by his codefendant Evans which was later suppressed as evidence against Evans on grounds that it was "tainted" by improper police interrogation. As a result of that suppression, Evans' conviction was set aside by the Court of Appeals before this Court considered Bruton's appeal. *Bruton v. United States*, *supra*, 391 U.S. at 124, n. 1. Thus, the *Bruton* Court's fear that the jury, despite limiting instructions, might consider Evans' confession against Bruton was compounded by the fact that Evans' confession was "tainted" (and therefore unreliable) and could not be utilized even against its maker. The facts of this case stand in stark contrast: the Illinois trial court specifically found the confessions of Petitioner and her codefendant Edwin Thomas to have been made after knowing and voluntary waivers of their fifth amendment privileges, and on that basis admitted each confession into evidence at their joint trial. (R. 237)

Lastly, here, the question is not one of the efficacy of limiting instructions as in *Bruton*. The trial court's an-

---

[1] *continued*
correct in their resolution of the Confrontation Clause issues raised at a bench trial, are less than precise in their reliance on *Bruton* as authority. *Longee* is also clearly distinguishable from this case, as the confessions there clearly failed to interlock on the fundamental question of relative culpability, thus calling the reliability of the hearsay statements into question.

nouncement of its verdict finding Petitioner guilty of murder (Joint Appendix in case 84-6807, *Lee v. Illinois*, at pages 25-26) (hereinafter "J.A.") indicates that the trier of fact relied, in part, on evidence contained within the confession of Petitioner's codefendant, Edwin Thomas, in deciding Petitioner's guilt. If Petitioner was not afforded an opportunity to cross-examine Thomas at their trial, a fact which will be assumed for the sake of this argument (*but see* Argument II, *infra*), this Court must then determine whether that substantive use of the hearsay confession denied Petitioner rights guaranteed her by the Confrontation Clause. *Pointer v. Texas*, 380 U.S. 400 (1965). This case thus raises a question which arises under the Confrontation Clause of the sixth amendment but which was not addressed by *Bruton*.

The present question is one foreseen in 1979 by Mr. Justice Stevens in his dissent from the plurality opinion in *Parker v. Randolph*, *supra*. In that case, this Court's plurality opinion held that the admission of interlocking confessions of nontestifying codefendants with proper limiting instructions does not constitute a violation of *Bruton*, but Mr. Justice Stevens' dissent observed that

> the factors relied on by the plurality support a proposition no one has even remotely advocated in this case—that the corroborated evidence used in this case was so trustworthy that it should have been fully admissible against all of the defendants, and the jury instructed as much. Conceivably, corroborating or other circumstances surrounding otherwise inadmissible hearsay may so enhance its reliability that its admission in evidence is justified in some situations. But before allowing such a rule to defeat a defendant's fundamental right to confront his accusers, this Court surely should insist upon a strong showing not only of the reliability of the hearsay in the particular case but also of the impossibility, or at

> least difficulty, of making the accusers available for cross-examination.

Parker v. Randolph, *supra*, 442 U.S. at 87 (footnote omitted).

It is that argument, not advanced by the parties or decided by the Court in *Parker*, which is clearly presented by the facts of this case. Respondents concede that the trial court in the instant case applied limited portions of Thomas' confession as substantive evidence against the Petitioner in rebuttal to affirmative defenses urged by her. Nonetheless, Respondents urge this Court to find that Thomas' statement was so reliable that its use was fully consistent with Petitioner's sixth amendment rights. *California v. Green*, 399 U.S. 149, 161 (1970).

The mission of the Confrontation Clause is to enhance the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *Dutton v. Evans*, *supra*, 400 U.S. at 89. Thus, while the Clause certainly "reflects a preference for face-to-face confrontation at trial" through cross-examination (*Ohio v. Roberts*, 448 U.S. 56, 63 (1980)), "all that the Sixth Amendment demands [is] 'substantial compliance with the purpose behind the confrontation requirement.'" *Id.*, 448 U.S. at 69, quoting *California v. Green*, *supra*, 399 U.S. at 166. Where hearsay evidence appears probative and reliable, the sixth amendment's preference for cross-examination will yield to society's legitimate interest in allowing the trier of fact to evaluate relevant and competent evidence which is inherently trustworthy. *See, e.g.*, *California v. Green*, *supra*.

In this case, implicit in the trial court's admission into evidence of the confession of the Petitioner and the confession of her codefendant Thomas, after a suppression hearing, is a specific finding that both confessions were

probative and reliable. Under these facts, to determine whether the use of Thomas' confession as substantive evidence against Petitioner ran afoul of the Confrontation Clause, this Court must answer two questions. *Ohio v. Roberts, supra.* First, has the prosecution demonstrated either that Thomas was unavailable as a witness so that admission of his confession was a necessity, or alternatively, that cross-examination was of such little value to Petitioner that it was unnecessary? Second, was Thomas' confession, although hearsay, sufficiently reliable to "augment accuracy in the factfinding process." *Id.*, 448 U.S. at 65; *see also* Fed. R. Ev., Rule 804(b)(3).

Application of this two-step analysis to the confession of Petitioner's codefendant, Edwin Thomas, clearly brings it within the category of admissible hearsay. Thomas was unavailable, cross-examination of him would have been of little value to Petitioner, and his confession was demonstrably reliable. Therefore, the admission of his confession as evidence against Petitioner satisfied both parts of the *Roberts* test, and no constitutional error occurred.

A. The Declarant Was Unavailable; Moreover, The Utility Of Cross-Examination Was Remote.

Edwin Thomas was jointly indicted with Petitioner on two counts of murder. (J.A. 2-3) He entered a plea of not guilty and stood trial alongside Petitioner after he and Petitioner withdrew their motions for severance. Obviously, at all times prior to and during trial he was possessed of his privilege against self-incrimination, and could not be required to testify in support of his detailed confession to murder. Just as obviously, Thomas was unlikely to waive this privilege to assist in the prosecution. The generally accepted view in facts like these is that Thomas was "unavailable" as a prosecution witness for purposes

of the necessity analysis. *California v. Green*, *supra*, 399 U.S. at 168, n. 17; *see also* McCormick, *Evidence*, § 253 at 608 (2d ed. 1972) ("While the rather general practice is to speak loosely of unavailability of the witness, the critical factor is the unavailability of this testimony . . . the witness may be physically present in court but his testimony nevertheless unavailable.")

Moreover, a

> demonstration of unavailability . . . is not always required. In *Dutton v. Evans [supra]* for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.

Ohio v. Roberts, *supra*, 448 U.S. at 65, n. 7. Certainly, the utility of cross-examination to Petitioner was, as to Thomas, extremely remote. Thomas had confessed to two murders in a statement which was virtually indistinguishable from that given by Petitioner when she confessed to the same murders. *Compare* J.A. 4-13 (confession of Petitioner) *with* J.A. 16-24 (confession of Thomas).

Under these facts, "the possibility that [Petitioner's] cross-examination of [Thomas] could conceivably have shown [the trier of fact] that the statement, though made, might have been unreliable was wholly unreal." *Dutton v. Evans*, *supra*, 400 U.S. at 89. The right to cross-examine Thomas had "far less practical value to [Petitioner after she] confessed to the crime." *Parker v. Randolph*, 442 U.S. 62, 73 (1979). The utility of any cross-examination by Petitioner of Thomas was, therefore, remote. Consequently, proof of unavailability is not required as a prerequisite to admission of Thomas' confession.

B. The Evidence Was Reliable.

Even where the unavailability/lack of utility prong is established, the Confrontation Clause bars the use of hearsay testimony unless the evidence is cloaked with sufficient "indicia of reliability." *California v. Green*, *supra*, 399 U.S. at 161. This Court must, therefore, determine "the 'reliability' of the statement . . . based on the circumstances under which it was given—circumstances that remain unaffected regardless of whether the witness is present or absent at the later trial." *Id.* at 167, n. 16. An analysis of the circumstances surrounding the making of Edwin Thomas' confession establishes beyond cavil the reliability of that confession.

Although neither *Parker* nor *Bruton* controls the outcome of this case,[2] both are instructive in analyzing the reliability of Thomas' confession, because both opinions discuss this Court's concerns about the reliability of a codefendant's confession which inculpates the defendant. It has been these concerns about reliability expressed in *Bruton* and *Parker* which have caused this Court to preclude the use of a codefendant's confession. However, once these concerns are identified and evaluated in the facts of this case, it will become apparent that none of the reliability problems foreseen in other cases exist here, and, therefore, Thomas' confession is properly admissible.

The primary concern expressed by the *Bruton* Court about the reliability of a codefendant's confession was the

---

[2] The Respondents have already demonstrated that the result in this case is not dictated by the Court's opinion in *Bruton*, see *supra*. Similarly, the opinion in *Parker v. Randolph*, *supra*, is not controlling here because, as Mr. Justice Stevens pointed out, that case offered this Court no occasion to address the substantive admissibility of a codefendant's confession.

confessor's "recognized motivation to shift blame to others." *Bruton v. United States*, *supra*, 391 U.S. at 136. However, no such motivation is shown in the confession of Edwin Thomas. He made no attempt to shift blame to Petitioner. To the contrary, he freely described his own actions in stabbing Odessa Harris and in beating Mattie Darden. He attributes to himself conduct ascribed to him by Petitioner's confession, and attributes to Petitioner actions which she admits taking. This is reflected by Thomas' assurance to Petitioner before he confessed, while both were in police custody, that neither malefactor would be required to "take the rap alone." (R. 114). Thomas' confession was given immediately after that encounter. *Id.* Thus, this Court's first concern about the reliability of a codefendant's confession is simply not present in this case.

Second, implicit in *Bruton* is this Court's concern that a codefendant's confession may be unreliable because it results from coercion or is otherwise tainted by police interrogation techniques. The facts of *Bruton* made that concern a reality; *id.* at 124; *see also Parker v. Randolph*, *supra*, 422 U.S. at 86 (Stevens, J., dissenting). No such risk of unreliability exists here. The Illinois trial court, after a full hearing, held that both Thomas' and Petitioner's confessions were voluntarily given and not the product of any coercive police conduct. This ruling is amply supported by the record and can be fully credited by this Court. *See Schneble v. Florida*, 405 U.S. 427, 429 (1972).

Although less frequently voiced, other concerns about the general reliability of codefendant's confessions have influenced this Court's determination of admissibility. Such concerns include the possibility that a person may "confess" to a crime in an effort to curry police favor or from

a psychological need to assume blame, even though the confessor is not guilty. *See, e.g., Parker v. Randolph, supra*, 442 U.S. at 86, n. 6 (Stevens, J., dissenting). No such possibility exists here. Thomas' confession was fully detailed, internally consistent, corroborated by Petitioner's confession, and further corroborated in minute detail by the physical and testimonial evidence received at trial. There is no possibility that Thomas was confessing to crimes he did not commit; nor could his graphic and chilling descriptions of these murders be viewed as a misguided attempt to curry favor with the police. It is obvious that Thomas' confession accurately details his actions on the evening of these murders.

Not only are this Court's concerns about lack of reliability absent here, but there is a compelling, affirmative reason to conclude that Thomas' confession is fully reliable: Thomas' confession interlocks with the confession of Petitioner in every salient respect. This factor is consistent with the underlying premise adopted by the plurality opinion in *Parker* and makes the use of Thomas' confession against Petitioner proper under the sixth amendment. The confessions interlock in that both describe the same crimes, the same time and location of the crimes, the same victims, the same manner of attack, the same efforts to conceal the crimes, the same motives for the crimes, and both identify the same two perpetrators of the offenses, i.e., Petitioner and Edwin Thomas. But most significantly, each confession interlocks with the other regarding the relative culpability of the actors. This fact answers the last major concern voiced by members of this Court about the reliability of codefendants' confessions. *Parker v. Randolph, supra*, 442 U.S. at 79 (Blackmun, J., concurring); and *id.* at 84 (Stevens, J., dissenting). That concern stems from the difficult question of whether confessions "in-

terlock" where both parties confess to the same crime but differ as to which actor performed acts constituting a necessary element of the crime. *See, e.g., United States v. Parker*, 622 F.2d 298 (8th Cir. 1980), *cert. denied*, 449 U.S. 851 (1980). Respondents assert that Thomas' confession is shown to be reliable where it does not differ from Petitioner's confession on the pivotal issue of which defendant actually performed acts constituting the elements of the crime of murder. *United States v. Paternina-Vergara*, 749 F.2d 993 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1197 (1984).

Regarding the murder of Odessa Harris, Thomas' confession shows that he stabbed Harris. His confession does not assert that Petitioner stabbed Harris. Petitioner's confession, by comparison, also asserts that Thomas stabbed Harris and that Petitioner did not personally inflict any wounds upon the victim. Thus, Thomas' guilt as the principal actor in the Harris murder is shown by his confession and is corroborated by Petitioner's confession.

Conversely, Petitioner's own confession demonstrates that she was legally accountable for Thomas' murder of Harris, that accountable conduct is also detailed in Thomas' statement. Petitioner's confession reveals that after Thomas stabbed Harris, Harris began "moaning" and "calling" out to Mattie Darden (Petitioner's aunt) for help. (J.A. 7) Millie Lee did not aid Ms. Harris; Millie Lee did not allow Mattie Darden to aid Ms. Harris; indeed, to the contrary, Millie Lee "ran or walked" into Darden's bedroom and when Darden ordered Lee to "get out of her way", Lee armed herself with a knife and killed Darden. *Id.* These facts can only be described as conduct by Petitioner which assisted Thomas in the Harris murder by preventing Darden from interfering with that murder.

Thomas' confession describes Petitioner's conduct during the Harris murder in the same fashion. He states that after Harris was stabbed "she started calling for [Petitioner's] Aunt. She was calling 'Aunt Beedie, Aunt Beedie' . . . . I told [Petitioner] that she had to keep her Aunt Beedie quiet . . . I handed [Petitioner] the little knife . . .". (J.A. 19) This confession is equivalent to Petitioner's own as it describes those actions by Petitioner which made her accountable for Thomas' conduct in murdering Harris.

These actions of Petitioner lead to the wholly legitimate conclusion that Petitioner was legally accountable for Thomas' murderous actions in stabbing Odessa Harris. Under Illinois law, Petitioner can be found guilty of murder by accountability even where she struck no blows, provided it is shown that

> "(e)ither *before or during* the commission of an offense, and with the intent to promote *or facilitate* such commission, (s)he solicits, *aids, abets*, agrees or attempts to aid, such other person in the planning or commission of the offense.

Ill.Rev.Stat., ch. 38, § 5-2(c) (emphasis supplied). *See also People v. Richardson*, 32 Ill. 2d 472, 207 N.E.2d 478, 481 (1965), *cert. denied*, 384 U.S. 1021 (1965); *People v. Gil*, 125 Ill. App. 3d 892, 466 N.E.2d 1205, 1207-8 (1st Dist. 1984).

Thus, while the two confessions do not interlock "as to [some] details" (*United States v. Paternina-Vergara, supra*, 749 F.2d at 999), such as whether there was a predetermined plan to murder these victims on this specific occasion, that fact is of no moment here, for premeditation is not a necessary element of the crime of murder in Illinois, *Ill. Rev. Stat.*, ch. 38, § 9-1(a)(1), and defendants were not charged with conspiracy. (J.A. 2-3) What really matters is that as to the necessary elements of the

crime of Harris' murder and accountability for that crime of murder under Illinois law, the confessions interlock.

With regard to the second murder, Thomas' confession reveals that after Petitioner stabbed Mattie Darden, Petitioner asked him for a hammer. *Id.*, p. 20. He then describes his inability to find a hammer; Petitioner's request for and use of a skillet to beat Darden over the head; the breaking of the skillet; and the use of a second skillet. *Id.* He carefully details the fact that both he and Petitioner struck blows with this second skillet.

Petitioner described her acts in the murder of Mattie Darden in almost precisely the same way. Petitioner's confession does not detail mutual combat; it does not describe self-defense; it does not detail the crime of voluntary manslaughter as that offense is defined by Illinois law (*Ill.Rev. Stat.*, ch. 38, § 9-2).[3] Petitioner confessed that upon entering the bedroom and finding Darden with a knife in her hand, Petitioner immediately armed herself in the kitchen and returned to the bedroom "and then I stabbed her. I kept stabbing her." (J.A. 7)

Petitioner's confession also tracks Thomas' in its revelation that when her victim was totally disabled, she and Thomas began to smash her aunt's skull with an iron skillet. Such conduct constitutes murder under Illinois law. *See, e.g., People v. Thornton*, 26 Ill. 2d 218, 186 N.E.2d 259 (1962).

On its face, the Petitioner's statement is a confession to the necessary elements of the murder of Mattie Darden, as charged in the indictment in this case. Petitioner's confession admits conduct attributed to her by

[3] The text of this statute is set forth in Argument III, *infra*, at page 31.

Thomas, attributes to Thomas conduct admitted by him, and her confession interlocks with Thomas' on the relative culpability of each actor in performing those acts which constitute the elements of murder.

Thus, each confession interlocks with the other as to each separate murder, and the mutual agreement of the confessions as to the relative culpability of the actors provides a trier of fact with "the most knowledgeable and unimpeachable source of information about [their] past conduct." *Parker v. Randolph*, *supra*, 442 U.S. at 72, quoting *Bruton v. United States*, *supra*, 391 U.S. at 139-40 (White, J., dissenting). This circumstance lends to the Thomas confession sufficient indicia of reliability to justify the use of that confession as substantive evidence against Petitioner.

Still another factor militates in favor of allowing the Thomas confession to be used as substantive evidence:

> His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Dutton v. Evans, 400 U.S. 74, 89 (1970); *see also United States v. Harris*, 403 U.S. 573, 584 (1971) ("Admissions of crime . . . carry their own indicia of credibility . . ."); *United States v. Matlock*, 415 U.S. 164, 176 (1974) (same); Fed. Rule Evid. 804(b)(3); Comments: *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Cal. L. Rev. 1189, 1213 (1978) ("Inculpatory statements should be admitted under rule 804(b)(3) if they can pass a 'strict scrutiny with corroboration' test.") Thomas made his statement after being admonished about his privilege against self-incrimination and

under circumstances making him aware that his comments would subject him to criminal liability; therefore, his statement against penal interest is inherently reliable.

C. The Admissibility Of Thomas' Confession Under Illinois Law Does Not Control This Constitutional Question.

Petitioner urges that Thomas' confession was inadmissible evidence against her as a matter of Illinois law. (Pet. Brief, p. 11) Such an assertion, of course, is not determinative even if true. This Court's analysis in *Bruton*, for example, was based on factors of constitutional law "quite apart from the law of evidence." *Nelson v. O'Neil*, 402 U.S. 622, 626 (1971).

Furthermore, even if true, "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *California v. Green*, *supra*, 399 U.S. at 156. The issue before this Court is not whether the trial judge violated an Illinois rule of evidence. The issue raised is whether that court violated Petitioner's rights under the Confrontation Clause. In this regard, it is worth repeating that the Clause "has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant." *Parker v. Randolph*, *supra*, 442 U.S. at 73.

In any event, Respondents do not agree that there was a violation of Illinois' law of evidence. The authority on which Petitioner relies, *People v. Tyner*, 30 Ill. 2d 101, 195 N.E.2d 675 (1964), is inapposite. The *Tyner* opinion, which was announced four years before *Bruton*, addresses an analytically distinct issue from the question presented here. *Tyner* ruled on the use of a codefendant's confession

as substantive evidence against a defendant who had not himself confessed. As this Court's plurality opinion in *Parker v. Randolph* recognizes, and as Respondents have urged throughout this brief, the fact that Petitioner in this case herself gave a confession which interlocks with that of her codefendant allows for a much different Confrontation Clause analysis than that applied in *Tyner* or *Bruton*.

Moreover, Illinois' law of evidence has evolved in the two decades since *Tyner* was decided to assure consistency with the teachings of this Court on Confrontation Clause issues. Thus, in *People v. Tate*, 87 Ill. 2d 134, 144, 429 N.E.2d 470, 475 (1981) the Illinois Supreme Court, relying on *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973), recognized the admissibility of hearsay statements-against-penal-interest. *Chambers* held that the admission of such statements is constitutionally permissible where: (1) the statement was spontaneous and occurred shortly after the crime; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against penal interest; and (4) there was an adequate opportunity for cross-examination of the declarant. The Illinois Supreme Court, in turn, adopted these four factors as "objective indicia of trustworthiness" which, when present, render such statements admissible under Illinois law. *People v. Tate*, *supra*, 87 Ill. 2d at 144, 429 N.E.2d at 475.

Therefore, although the Illinois Supreme Court has never specifically decided the precise issue raised by the Respondents herein—whether a codefendant's statement against penal interest may be admitted against a confessing defendant where both confessions interlock as to all salient factual elements of the crime—Respondents believe that under the *Tate/Chambers* analysis, the Illinois Su-

preme Court would find that Edwin Thomas' confession meets all four criteria and would conclude that it was admissible.

The more immediate concern is, of course, whether the trial court's substantive use of Thomas' confession as evidence against Petitioner was permissible under the Confrontation Clause. Here, as in *California v. Green*, 399 U.S. 149 (1970), a ruling by this Court that Petitioner's Confrontation Clause rights were not abridged at her trial would allow the Illinois courts to subsequently determine whether any violation of Illinois' law of evidence occurred at trial. Here, as in *California v. Green*, the ruling of the Illinois Appellate Court addressed only the Petitioner's federal constitutional claim, and made no effort to analyze the question of admissibility under the State's law of evidence. Therefore, a ruling by this Court that no Confrontation Clause violation occurred would permit the parties to address, in an Illinois court, the question of whether Edwin Thomas' confession was shown to be sufficiently trustworthy to permit its admission under the statement-against-penal-interest exception outlined in *Chambers v. Mississippi* and *People v. Tate*. Such a question of first impression is appropriately left to the Illinois court, and that collateral question is wholly distinct from the constitutional issues ripe for decision by this Court.

Both Petitioner and Thomas confessed, freely and voluntarily, to two crimes of murder. Both did so fully aware of the legal consequences of those confessions. Each gave a fully detailed, internally consistent description of their crimes which admitted every factual element for the crime of murder, and which was thoroughly corroborated by the extrinsic evidence in this case. Each of their confessions interlocks with the other in the crucial area of relative culpability. Each confession was, for all these reasons, in-

herently reliable. As such, nothing in the Confrontation Clause of the Sixth Amendment, as construed by this Court, precluded the trier of fact from relying on the Thomas confession in its determination of Petitioner's guilt. Therefore, the Petitioner's claim to the contrary should be rejected, and her convictions for murder affirmed.

II.

PETITIONER'S SIXTH AMENDMENT RIGHTS WERE NOT TRANSGRESSED BY THE INTRODUCTION OF HER CODEFENDANT'S CONFESSION BECAUSE SHE WAS AFFORDED THE OPPORTUNITY TO CROSS-EXAMINE HER CODEFENDANT BUT DECLINED TO DO SO.

The Respondents' assertion that this case is not controlled by *Bruton v. United States*, 391 U.S. 123 (1968) is further supported by the fact that in this case, unlike *Bruton*, Petitioner had but declined the opportunity to cross-examine Edwin Thomas, whose confession was later used as evidence against Petitioner.

Petitioner's brief on the merits before this Court, at page 9, contains the following assertion:

> The co-defendant did not testify at their joint trial. Petitioner was therefore not able to subject his accusations to cross-examination and was thereby denied her right of confrontation.

The Respondents do not believe that this assertion accurately portrays the facts of this case as reflected by the trial transcript.

Petitioner and her codefendant were jointly indicted for the murders of Mattie Darden and Odessa Harris. (J.A. 1-2) Each defendant was provided with a public defender for trial, and prior to trial each defendant filed a motion for severance and a motion to suppress their confessions.

See Ill. Rev. Stat., ch. 38, §§ 114-8, 114-11. On the day trial began, the defendants withdrew their request for severance, indicated their intent to have the trial court decide their guilt or innocence without a jury, and asked the trial court to consider their motions to suppress "along with the body of the trial." (R. 3)

Thereafter, the prosecution presented its case in chief. Few prosecution witnesses were cross-examined by counsel for either defendant. The bulk of the cross-examination which was conducted by the defendants of State witnesses was clearly designed to address issues relevant to their motions to suppress. (*See, e.g.*, R. 43-54, 120-138.) When the prosecution rested its case it moved that each defendant's confession be admitted into evidence, but the court reserved ruling on admissibility until it had decided the suppression motion. (R. 204)

Petitioner's counsel then called Petitioner as a witness "for purposes of the motion to suppress the confession only." (R. 205) Petitioner testified to the circumstances surrounding her confession. (R. 205-218) Codefendant Thomas declined to cross-examine Petitioner. (R. 213) Petitioner then rested and Edwin Thomas was summoned to testify by his counsel "under the same caveat as before. He's testifying merely for the motion to suppress . . . (his) statement." (R. 219)

During direct examination of Edwin Thomas, he was questioned by his attorney as follows:

Q: What condition was [Petitioner] in when you saw her [at the police station before you confessed]?

A: She was crying.

Q: Was she telling you to do anything?

A: She told me to go on and tell what happened.

Q: And it is after all that that you finally *told them what happened*, is that correct?

A: Yes.

Q: Okay, I have no further questions.

[Petitioner's counsel]: *No questions*, your Honor.

(R. 223-224) (emphasis supplied.)

Respondents urge that these facts reveal that Petitioner "had an effective opportunity for confrontation" of the witness against her. *California v. Green*, 399 U.S. 149, 165 (1970). Here, as in *Green*, the declarant was under oath; Petitioner was represented by counsel; Petitioner had every opportunity to cross-examine Thomas as to his claim that he had "told them what happened"; and the proceedings were conducted before a judicial tribunal equipped to provide a judicial record of the proceedings. *Id.* In addition, Thomas was physically present, to enable the trier of fact an opportunity to evaluate his demeanor. *California v. Green*, *supra*, 399 U.S. at 158.

This Court's opinion in *Green* flatly rejected the notion that confrontation is inadequate unless it is available "contemporaneous[ly]" with the trial itself. *Id.* at 153. The *Green* opinion demonstrates that the opportunity for cross-examination at certain other stages of an adversary proceeding (in *Green*, a preliminary hearing) "provides substantial compliance with the purposes behind the confrontation requirement. . .". *Id.* at 166.

Following the logic of *Green*, the United States Court of Appeals for the Second Circuit has found, under facts virtually indistinguishable from this case, that a defendant is not denied his confrontation rights where an inculpatory, out of court statement by a codefendant is utilized at trial, and it is shown that the defendant had an opportunity to cross-examine that codefendant during a pretrial hearing on the voluntariness of the codefendant's statement. *United States ex rel. Duff v. Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert. denied*, 406 U.S. 432 (1972).

The same result obtains in the case at bar. Petitioner complains that she "was not premitted to make a fair defense" and that this case embodies the "paradigmatic evil of trial by affidavit. . .". Pet. Br. at 18. Yet she stood mute in court while her codefendant stated under oath that his confession was an accurate summary of "what happened" on the evening of the murders. Whatever tactical or strategic reasons led to the decision to forego cross-examination of Thomas are not determinative of the constitutional analysis. If anything, the likely reason was that Petitioner could not hope to persuade the trier of fact that Thomas' confession was unreliable where it so closely matched her own, *Dutton v. Evans*, 400 U.S. 74, 88 n. 19 (1970), a factor which only lends further support to Respondents' contention that no violation of the Confrontation Clause occurred here. *Id.* at 88-90.

Accordingly, because Petitioner was given an opportunity to confront all witnesses against her, no sixth amendment violation has been shown, and her convictions for murder should be affirmed.

III.

ERROR, IF ANY, ARISING FROM THE TRIAL COURT'S CONSIDERATION OF PETITIONER'S CODEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE AGAINST PETITIONER WAS HARMLESS BEYOND A REASONABLE DOUBT.

Since the decision in *Bruton v. United States*, 391 U.S. 123 (1968) was announced, this Court has consistently held that the harmless error doctrine applies to *Bruton*-type claims arising under the Confrontation Clause. *Harrington v. California*, 395 U.S. 250 (1969); *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Schneble v. Florida*, 405 U.S. 427 (1972). In so ruling, this Court has proceeded on the assumption

that the juries involved in those cases disregarded limiting instructions or other efforts at redaction and utilized hearsay declarations as substantive evidence. *See, e.g., Harrington v. California, supra*, 395 U.S. at 253. Therefore, the harmless error analysis of those cases is appropriately applied to the case at bar, where the trier of fact actually applied the confession of codefendant Edwin Thomas as substantive evidence against Petitioner.

Thus, even if Petitioner's sixth amendment rights were violated at her trial for murder in the Illinois court (*but see* Argument I, *supra*), that fact does not *per se* mandate reversal of the resultant murder convictions. *Schneble v. Florida, supra*, 405 U.S. at 430. Rather, such an assumption simply requires this Court to apply its harmless error analysis to determine whether any such error was harmless beyond a reasonable doubt. That judgment must be based on the Court's own reading of the record and on what seems to the Court to have been the "probable impact" of codefendant Thomas' confession on the trier of fact. *Harrington v. California, supra*, 395 U.S. at 254. Put another way, this analysis requires the Court to decide whether the State's case against Petitioner would have been "significantly less persuasive" absent the Thomas confession. *Schneble v. Florida, supra*, 405 U.S. at 432.

In perfecting an appeal from her convictions to the Illinois Appellate Court, Fifth District, the Petitioner's counsel made the following unqualified assertion: "(a)dmittedly, the [trial] court could have found the [Petitioner] guilty without considering Edwin Thomas' confession." Brief for Defendant-Appellant, *People v. Lee*, No. 82-539 (Ill. App. Ct. 5th Dist.), p. 18. That statement is absolutely correct. Petitioner's confession, as corroborated by the other physical and testimonial evidence received at her trial, is ade-

quate to support a finding that she is guilty of the crimes charged in the indictment.

Petitioner's confession establishes that she was present as an active participant when the two murders occurred. It reveals that Petitioner killed two women because she "just couldn't take anymore . . . harass(ment) . . ." from her victims. (J.A. 12) By its text the confession reveals that Petitioner was accountable (*see Ill. Rev. Stat.*, ch. 38, § 5-2(c)) for Edwin Thomas' act of stabbing Odessa Harris: once Thomas stabbed Harris and Harris began calling out to Mattie Darden for help, Petitioner confronted Darden, saw that Darden had a knife and then armed herself with a knife, stabbed Darden, her aunt, and thereby prevented her from aiding the wounded Ms. Harris. (J.A. 7) This course of conduct can fairly be construed in only one fashion: Petitioner intended to assist Edwin Thomas in the crime of murdering Odessa Harris. This fact makes Petitioner guilty of that murder under Illinois accountability principles.

Similarly, Petitioner's confession establishes her guilt for the murder of her "Aunt Beedie", Mattie Darden. The text of Petitioner's confession illustrates that she first confronted her aunt after Thomas stabbed Harris; Petitioner did so while Harris was "moaning" for help. *Id.* When Ms. Darden displayed a knife and told Petitioner to "get out of her way" (*id.*), Petitioner got a knife and stabbed her aunt repeatedly. Then, because the stabbing did not kill her aunt, Petitioner used a skillet to bring about that result.

Petitioner's confession does not, however, support her claim that she was only guilty of voluntary manslaughter and not murder. The Illinois statute defining voluntary manslaughter provides:

Voluntary manslaughter. (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Ill. Rev. Stat., ch. 38, § 9-2.

Petitioner's claim that she acted under "a sudden and intense passion resulting from serious provocation" is without any support. There are absolutely no facts in her confession reflecting any conduct by Mattie Darden which was provocative. Indeed, her confession contains almost no mention of Darden's actions on the evening of the murder prior to the Harris stabbing. Moreover, Petitioner made no effort at trial to indicate what conduct by Darden could possibly have provoked such an inflamed response.

In like manner, Petitioner cannot rely on the "imperfect self-defense" prong of the Illinois voluntary manslaughter statute. *Ill. Rev. Stat.*, ch. 38, § 9-2(b). To the contrary, Petitioner's confession conclusively rebuts any theory of self-defense based on the apprehension of imminent death or great bodily harm, reasonable or otherwise. *Id.* The confession states that after Petitioner stabbed Darden sev-

eral times with a foot-long butcher knife, the victim "fell onto the bed, and then slid onto the floor. She was still alive. She was moaning and groaning." (J.A. 7) Petitioner's victim was by then obviously disabled. She could pose no threat to any person. Petitioner's conduct from this point onward effectively discounts any claim of self-defense. Petitioner asked Thomas to find a hammer; he could not, so he brought Petitioner a cast iron skillet. Petitioner then struck Darden on the head with sufficiently venomous force to break this iron skillet into pieces. Undaunted, Petitioner requested and received a second skillet from Thomas, and she and Thomas then took turns bludgeoning the prone figure of Mattie Darden. All of these facts are contained within Petitioner's confession.

Nothing in Petitioner's statement dilutes her obvious intent to murder Mattie Darden. Nothing produced at Petitioner's trial would lend even slight credence to a claim that Petitioner acted under an apprehension, reasonable or unreasonable, that she faced imminent peril from Darden. The confession simply reveals an intent to commit murder.

Further, the Petitioner's confession is corroborated in all material ways by the physical and testimonial evidence received at her trial. That corroboration was so extensive and complete that the trier of fact felt compelled to comment on it in announcing its verdict. (J.A. 26) The weapons used, the lighter fluid which incinerated the victims' bodies, and the other physical evidence recovered from the murder scene all corroborate the details of Petitioner's confession. There was absolutely no evidence produced at trial which did not buttress the accuracy of Petitioner's confession. *See Schneble v. Florida*, *supra*, 405 U.S. at 431.

Under these circumstances, it is clear that the Edwin Thomas confession is merely cumulative evidence of Peti-

tioner's guilt, evidence which at most is corroborative of Petitioner's own detailed confession. Therefore, the trial court's announced findings in this trial were, at most, harmless error. *Schneble v. Florida, supra*, 405 U.S. at 430-432.

Petitioner's brief before this Court resists application of the harmless error doctrine by claiming that nothing in her confession shows "premeditation on her part" of "a prior plan to commit murder." Pet. Br. at 16. These assertions, even if accurate, are simply irrelevant. The Illinois murder statute requires proof of an intent to kill; it does not contain, as an element of the offense of murder, a requirement that the killing be premeditated. *Ill. Rev. Stat.*, ch. 38, § 9-1(a)(1).

In this regard, Respondents note that the trial court's announcement of its verdicts did express its belief that "a previously conceived plan to dispose of Miss Darden" existed between Petitioner and Edwin Thomas. This comment, based on Thomas' confession, is best understood in context.

During their closing arguments at trial, counsel for Thomas and Petitioner urged that, at most, their clients were guilty of voluntary manslaughter. Petitioner's counsel argued that she was not accountable for Thomas' murder of Odessa Harris, and that as to the murder of Mattie Darden, "a mutual quarrel [was shown to] support a verdict of voluntary manslaughter." (R. 234) Thomas' counsel argued that both murders were shown to have been committed "under an intense sudden passion." (R. 235)[4]

[4] Petitioner's brief before this Court, at page 10, appears to urge that both prongs of Illinois' voluntary manslaughter statute could apply to her case.

Immediately following these arguments, the trial court announced its verdict. (J.A. 25-26) Rejecting both the "mutual quarrel" and the "sudden and intense passion" efforts to mitigate the defendants' crimes from murder to voluntary manslaughter, the trial court noted that both claims were rebutted by evidence that the murders were planned beforehand.

This remark by the trial court is nothing more than a rejection of Petitioner's theory of defense by the use of Thomas' confession as rebuttal evidence. Even if such a usage constitutes a technical violation of the sixth amendment (*but see Tennessee v. Street*, ____ U.S. ____, 105 S.Ct. 2078 (1985)), such a violation is harmless error. Petitioner's claims of self-defense or sudden, intense passion are equally rebutted by her own confession, as is demonstrated above. Here again, the use of Thomas' statement simply could not have provided any more weight to the overwhelming evidence of guilt provided by the Petitioner's own voluntary, detailed, fully corroborated confession.

Application of the harmless error doctrine is particularly appropriate in this case. Petitioner is not like the usual defendant raising a *Bruton* claim; she does not come to this Court after consistently maintaining her innocence for the crimes charged. To the contrary, Petitioner decided at a very early stage of this case "that she just wanted to get it off her chest." (R. 32) Moreover, her lengthy and detailed confession interlocks, in all salient respects, with the allegedly inadmissible confession of Edwin Thomas. Here, as "in most interlocking-confession cases, any error in admitting the confession of a non-testifying codefendant will be harmless beyond a reasonable doubt." *Parker v. Randolph*, 442 U.S. 62, 78 (1979) (Blackmun, J., concurring in the result.)

Petitioner's guilt for two crimes of murder is plainly apparent from the record on appeal before this Court. Once her voluntary confession was placed before a trier of fact alongside the corroborating physical evidence recovered from the murder scene, no plausible set of circumstances can be imagined under which Petitioner could have been found guilty of any offense other than murder. The efficacy of the sixth amendment and the cause of justice are not advanced by a reversal of her convictions under these circumstances. Because any constitutional error arising at Petitioner's trial was, at most, harmless, Petitioner's convictions must be left undisturbed.

CONCLUSION

This Court has consistently chosen to construe the language of the Confrontation Clause in a pragmatic fashion, allowing the vested rights of criminal defendants to be fully protected while simultaneously recognizing that some forms of hearsay evidence are so reliable that they should be admissible as evidence to aid the trier of fact in reaching a just verdict. This case presents the Court with an opportunity to continue that tradition. Because the confession of Edwin Thomas has been shown to be reliable and trustworthy, the circumstances of this case establish that his confession could be used as substantive evidence against Petitioner without transgressing the sixth amendment. Therefore, Petitioner's convictions for murder should be affirmed.

Alternatively, Petitioner's convictions should be affirmed because she was afforded an opportunity to cross-examine her codefendant but chose not to do so. Such facts

preclude any finding that Petitioner was denied her rights under the sixth amendment.

Finally, Petitioner's convictions must be affirmed because she has freely and voluntarily confessed to two crimes of murder, and any perceived sixth amendment error arising at her trial was, in light of that corroborated confession, plainly harmless.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
JILL WINE-BANKS
First Assistant Attorney General
MARK L. ROTERT *
Chief, Criminal Appeals Division
Office of the Attorney General
State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235
Counsel for Respondents

* Counsel of Record